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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-53
)	
KR PARTNERS)	File No. BPH-911001MB
)	
KES COMMUNICATIONS, INC.)	File No. BPH-911003MH
)	
LORI LYNN FORBES)	File No. BPH-911004MH
)	
For a Construction Permit for a)	
New FM Station on Channel 256C in)	
Waimea, Hawaii)	

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

MOTION TO ENLARGE ISSUES AGAINST KES COMMUNICATIONS, INC.

KR Partners ("KR"), by counsel and pursuant to 47 C.F.R. Section 1.229(b)(1), hereby requests the Presiding Judge to enlarge the issues against KES Communications, Inc. (KES) to determine whether it has reasonable assurance of the availability of its transmitter site and whether it has misrepresented the availability of its site. In support thereof the following is stated.

"[T]he touchstone for reasonable assurance of site availability is the site owner's or his authorized agent's express approval of the site specification or at least some basic negotiations between the parties from which reasonable assurance can be inferred." Cuban-American Limited, 2 FCC Rcd 3264, 3266 (Rev. Bd. 1987), review denied in part, granted in part on other grounds, 67 RR2d 1438 (1990), recon. denied 68 RR2d 1088 (1990) (citations omitted). When a site owner establishes conditions precedent to the use of a site, an applicant cannot simply ignore those conditions and still claim to have reasonable

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assurance. Dutchess Communications Corp., 101 FCC 2d 243, 253, 254 (Rev. Bd. 1985), citing Shoblom Broadcasting, Inc., 95 FCC 2d 444 (Rev. Bd. 1983), review denied, FCC 84-119, released April 2, 1984, aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC, 762 F. 2d 138 (D.C. Cir. 1985); Valley FM Radio, 57 RR 2d 420 (Rev. Bd. 1984).

KES has not met these requirements. KES proposes to construct a new 138 meter (453 foot) tower at its proposed transmitter site to replace an existing 150 foot tower. KES Application, Section V-B Question 7(a)(2) and Technical Exhibit TE-1, Technical Statement. In response to Question 3 of Section VII, Certifications, KES identified "Conrad Louie" as the "owner" of its proposed site and the person who provided reasonable assurance of its availability. Relevant excerpts of KES's application are appended as Attachment 1.

In response to the Standard Document Production Order, 47 C.F.R. Section 1.325(c)(1)(vi), which requires applicants to exchange "all documents related to the applicant's proposed transmitter site," KES exchanged a single, one page letter from Conrad Loui, Project Manager, Network Services, Motorola Communications International, Inc. KES describes this letter as a "[t]ransmitter site assurance letter from Motorola Communications International, Inc. to KES." A copy of the letter and KES's description of that letter are appended as Attachment 2.

The relevant terms of the Motorola letter are as follows:

In the event the Federal Communications Commission should grant to you and/or your

assignees a construction permit for an FM Radio Station at [Waimea].... [t]hen the undersigned agrees to enter into negotiation with you for a lease, subject to the terms and conditions in Motorola's underlying lease, equipment meeting site and engineering standards, frequency compatibility, non-interference and mutually agreed upon terms and conditions for site rental (Emphasis added).

Plainly, Motorola is not the owner of KES's proposed transmitter site, but rather a leasee of the property. KES does not propose to use Motorola's existing tower, but rather proposes to construct a new tower, three times the height of Motorola's tower. While Mr. Loui may have authority as an agent of Motorola to discuss the use of its existing tower, he is not an agent of the property owner, nor is he the property owner (as KES described him in its application). There is no indication that KES has ever contacted or discussed with the property owner whether it could construct a new, 453 foot tower at the site. Absent any indication of the site owner's willingness to make the site available to KES it does not have reasonable assurance of its availability. National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd 5641, 5643 (1987); Barry Skidelsky, 7 FCC Rcd 1, 7 (Rev. Bd. 1992), review denied, FCC 92-398, released September 2, 1992.

Further, even if Mr. Loui had authority to authorize the use of KES's proposed site, his letter sets forth explicit conditions before Motorola would even enter into negotiation with KES for its

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

agreed terms and conditions. There is no indication that KES has met, or agreed to meet any of these conditions. Compare, Cuban-American Limited, supra. Moreover, it is only after all of these conditions are met that Motorola would then agree to "enter into negotiation." Thus no negotiation concerning the availability of the site has actually occurred. Absent some basic negotiation between parties reasonable assurance cannot exist. See Cuban-American Limited, 2 FCC Rcd at 3266.

In light of the foregoing, KES's representation in its application that Mr. Loui, the owner of KES's proposed site, provided reasonable assurance of the site's availability, is patently false. Mr. Loui is not the site's owner, he did not have authority to provide reasonable assurance of the site's availability, and his letter does not provide reasonable assurance, even if he had such authority. Thus, in addition to a substantial and material question concerning the availability of KES's proposed site, a similar question exists as to whether KES engaged in misrepresentation or lacked candor in stating that it had obtained reasonable assurance of the availability of its site.

In the Commission's Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied 7 FCC Rcd 5339 (1992), the Commission established \$20,000 as the base amount for a forfeiture assessed under Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, for misrepresentation or lack of candor in the broadcast context. This represents the maximum standard forfeiture amount which the Commission

established, which reflects the serious gravity of the violation involved. See Policy Statement at para. 4. In the General Instructions to FCC Form 301 the Commission advises applicants that "[r]eplies to questions in this form and the applicant's statements constitute representations on which the FCC will rely in considering the application." FCC Form 301, General Instruction F. Section VII of the application form contains the following language:

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503). (Emphasis and capital letters in original.)

Misrepresentation or lack of candor, if committed, is, therefore, one of the most serious violations of the Communications Act and the Commission's rules that an applicant can commit. In the event that the requested issues are resolved adversely to KES, and it is found to have engaged in misrepresentation or to have lacked candor with respect to its site certification, the Presiding Judge should assess a forfeiture in the amount of \$20,000, or an amount up to the statutory maximum, as the facts warrant. As set forth in the Policy Statement, an upward adjustment of the standard forfeiture amount may be made for, among other things, egregious misconduct, an intentional violation, substantial harm, substantial economic gain, or a continuous violation.¹


¹ For each day of a continuing broadcast related violation the Commission may assess forfeitures of up to \$25,000, up to a maximum of \$250,000. Policy Statement at para. 3; 47 U.S.C. Section

Wherefore, for the foregoing reasons, KR respectfully requests the Presiding Judge to add the following issues with respect to KES:

1. To determine whether KES Communications, Inc. has reasonable assurance of the availability of its proposed transmitter site.
2. To determine whether KES Communications, Inc. engaged in misrepresentation or lacked candor in certifying the availability of its proposed transmitter site.
3. To determine, in light of the foregoing issues, whether KES Communications, Inc. is basically qualified.

Respectfully submitted,

KR PARTNERS

By: 
Mark Van Bergh
Richard H. Waysdorf

WAYS DORF & VAN BERGH
Suite 504
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 785-2870

Dated: April 15, 1993

REQUESTED DISCOVERY

In the event the foregoing Motion to Enlarge Issues Against KES Communications, Inc. is granted, KR would request KES to produce the following documents:

1. All documents related to any communication which any principal, agent or representative of KES, or any other person on behalf of KES, had with respect to the availability of KES's proposed transmitter site, including telephone records and notes or other written memoranda commemorating oral discussions.

2. All documents which identify any principal of KES, any agent or representative of KES, or any other person whom KES requested to or who did in fact participate in discussions or communications with any other person concerning the availability of KES's proposed transmitter site.




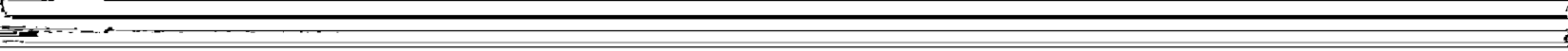







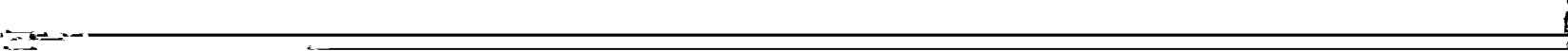




3. All documents which relate to any investigation or inquiry which any principal of KES, agent or representative of KES, or any other person made on behalf of KES related to the availability of KES's transmitter site.

4. All documents which relate to any effort or action which KES, any principal of KES, any agent or representative of KES, or any other person undertook on behalf of KES with respect to complying with, or investigating or researching the conditions contained in the letter dated September 26, 1991, from Conrad Loui to Karen Slade/KES Communications.

5. All documents related to any efforts made by a principal of KES, an agent or representative of KES, or any other person on

behalf of KES to determine the ownership of KES's proposed transmitter site.

6. All documents related to any efforts made by a principal of KES, an agent or representative of KES, or any other person on behalf of KES to determine whether Mr. Gerard Louis Motenale



ATTACHMENT 1

SECTION VI - EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

1. Does the applicant propose to employ five or more full-time employees?

☐ Yes ☒ No

If Yes, the applicant must include an EEO program called for in the separate Broadcast Equal Employment Opportunity Program Report (FCC 996-A).

SECTION VII - CERTIFICATIONS

1. Has or will the applicant comply with the public notice requirement of 47 C.F.R. Section 73.3580?

☒ Yes ☐ No

2. Has the applicant reasonable assurance, in good faith, that the site or structure proposed in Section V of this form, as the location of its transmitting antenna, will be available to the applicant for the applicant's intended purpose?

☒ Yes ☐ No

Exhibit No.
N/A

If No, attach as an Exhibit, a full explanation.

3. If reasonable assurance is not based on applicant's ownership of the proposed site or structure, applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure.

Name of Person Contacted Conrad Louie

Telephone No. (include area code) (808) 488-7286

Person contacted: (check one box below)

☒ Owner ☐ Owner's Agent ☐ Other (specify)

The APPLICANT hereby waives any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein.

The APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

In accordance with 47 C.F.R. Section 1.65, the APPLICANT has a continuing obligation to advise the Commission, through amendments, of any substantial and significant changes in information furnished.

SECTION VII - CERTIFICATION (Page 6)

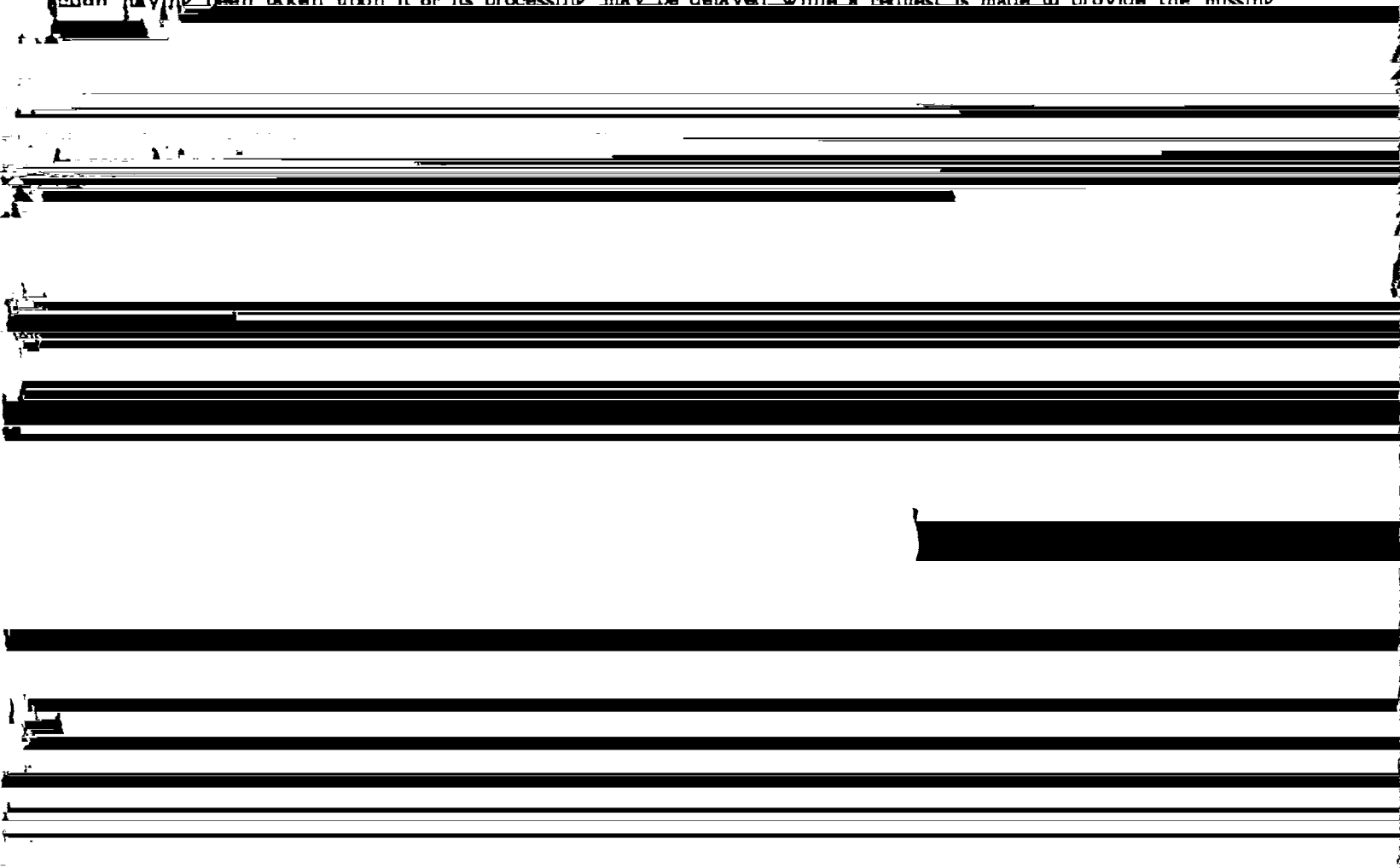
WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT.
U.S. CODE, TITLE 18, SECTION 1001.

I certify that the statements in this application are true and correct to the best of my knowledge and belief, and are made in good faith.

Name of Applicant KES COMMUNICATIONS, INC.	Signature <i>Karen E. Stade</i>
Date <i>October 1, 1991</i>	Title President

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT
AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, analysts, engineers and applications examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing



FOR COMMISSION USE ONLY

File No. _____

ASB Referral Date _____

Referred by _____

Section V-B - FM BROADCAST ENGINEERING DATA

Name of Applicant

KES Communications, Inc.

Call letters (if issued)

New FM

Is this application being filed in response to a window? ☒ Yes ☐ No

If Yes, specify closing date: October 3, 1991

Purpose of Application: (check appropriate boxes)

SECTION V-B - FM BROADCAST ENGINEERING DATA (Page 2)

4. Does the application propose to correct previous site coordinates?
If Yes, list old coordinates.

☐ Yes ☒ No

Latitude		Longitude	
----------	--	-----------	--

5. Has the FAA been notified of the proposed construction?

☒ Yes ☐ No

If Yes, give date and office where notice was filed and attach as an Exhibit a copy of FAA determination, if available.

Exhibit No.
1

Date October 1, 1991 Office where filed Western-Pacific Region-Los Angeles, CA

6. List all landing areas within 8 km of antenna site. Specify distance and bearing from structure to nearest point of the nearest runway.

Landing Area	Distance (km)	Bearing (degrees True)
(a) <u>None</u>		
(b) _____		

7. (a) Elevation: (to the nearest meter)

(1) of site above mean sea level: 1542 meters

(2) of the top of supporting structure above ground (including antenna, all other appurtenances, and lighting, if any); and 138 meters

(3) of the top of supporting structure above mean sea level [(aX1) + (aX2)] 1680 meters

(b) Height of radiation center: (to the nearest meter) H - Horizontal; V - Vertical

(1) above ground 134 meters (H)

134 meters (V)

(2) above mean sea level [(aX1) + (bX1)] 1676 meters (H)

1676 meters (V)

(3) above average terrain 865 meters (H)

865 meters (V)

8. Attach as an Exhibit sketch(es) of the supporting structure, labelling all elevations required in Question 7 above, except item 7(b)(3). If mounted on an AM directional-array element, specify heights and orientations of all array towers, as well as location of FM radiator.

Exhibit No.
2

9. Effective Radiated Power: (Equivalent to 100 kw @ 600 meters HAAT.)

(a) ERP in the horizontal plane 41.0 kw (H=) 41.0 kw (V=)

(b) Is beam tilt proposed?

☐ Yes ☒ No

If Yes, specify maximum ERP in the plane of the tilted beam, and attach as an Exhibit a vertical elevational plot of radiated field.

Exhibit No.
N/A

 kw (H=) kw (V=)

-Polarization

NEW FM APPLICATION
KES COMMUNICATIONS, INC.
CH 256C - 99.1 MHZ - 41 KW
WAIMEA, HAWAII
October 1991

Technical Exhibit
TE-1

Bromo Communications, Inc.
P.O. Box M - 1331 Ocean Boulevard, Suite 201
St. Simons Island, Georgia 31522
(912) 638-5608

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NEW FM APPLICATION
KES COMMUNICATIONS, INC.
CH 256C - 99.1 MHZ - 41 KW
WAIMEA, HAWAII
October 1991

TECHNICAL STATEMENT

This technical statement and attached exhibits were prepared on behalf of KES Communications, Inc ("KES"), an applicant seeking authority to construct a new FM station on Channel 256C at Waimea, Hawaii. KES is proposing the equivalent of a maximum Class C facility, 41.0 kilowatts at 864.7 meters height above average terrain.

The site proposed by KES already has an existing one hundred and fifty foot tower. KES is proposing to replace that tower with a new taller structure to accommodate it's proposed antenna system. The Federal Aviation Administration has been advised of the new structure. The elevation of the site was determined by interpolating between the elevation contours of the U.S.G.S. 7.5 minute topographic map. The elevation matches that provided to KES by the present owner of the existing tower.

ATTACHMENT 2

LAW OFFICES
MEYER, FALLER, WEISMAN AND ROSENBERG, P. C.

4400 JENIFER STREET, N.W.

SUITE 380

WASHINGTON, D.C. 20015-2113

(202) 362-1100

FACSIMILE (202) 362-9818

April 12, 1993

Delivery By Hand

RICHARD P. MEYER
MORTON A. FALLER*
DAVID E. WEISMAN*
KEITH A. ROSENBERG*
ALAN S. TILLES
JEFFREY W. RUBIN*
DOUGLASS S. STONE*
LLOYD W. COWARD*
SHARON M. GOLEY*
TERRY J. ROMINE*
CARY S. TEPPER*

*ALSO ADMITTED IN MARYLAND
*ALSO ADMITTED IN VIRGINIA

MARYLAND OFFICE:

6000 EXECUTIVE BOULEVARD, SUITE 501
ROCKVILLE, MARYLAND 20852
(301) 468-2040

VIRGINIA OFFICE:

9302 LEE HIGHWAY, SUITE 1100
FAIRFAX, VIRGINIA 22031

PETER A. GREENBURG**
OF COUNSEL

Gary Schonman, Esq.
Hearing Division, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

Dan J. Alpert, Esq.
1250 Connecticut Avenue, N.W.
7th Floor
Washington, D.C. 20036

Mark Van Bergh, Esq.

MEYER, FALLER, WEISMAN AND ROSENBERG, P. C.

Section 1.325(c)(1)(iii):

No such documents exist.

Sections 1.325(c)(1)(iv) and 1.325(c)(1)(v):

Financial Commitment Letter from First Interstate Bank to KES Communications, Inc., dated March 9, 1993. (2 pages)

Financial Commitment Letter from Superior Financial Mortgage Lending Services to KES Communications, Inc., dated September 23, 1991. (2 pages)

Section 1.325(c)(1)(vi):

Transmitter site assurance letter from Motorola Communications International, Inc. to KES Communications, Inc. dated September 26, 1991.

Sections 1.325(c)(1)(vii), 1.325(c)(1)(viii) and 1.325(c)(1)(ix):

No such documents exist.

Section 1.325(c)(1)(x):

Letter dated March 26, 1993 from Bernard C. Parks to Karen Slade. (1 page)

Letter dated April 2, 1993 from Yvonne Brathwaite Burke to Karen Slade. (1 page)

One page list of 1992 George Foster Peabody Awards recipients.

Section 1.325(c)(1)(xi):

No such documents exist.

Section 1.325(c)(1)(xii):

Retainer Letter from Gary Smithwick, Esq. to Karen Slade, dated September 23, 1993. (4 pages)



MOTOROLA

Communications International Inc.

Address Reply to:
89-1180 Iwaena Street
Aiea, Hawaii 96701
(808) 487-0033

September 26, 1991

Karen Slade / Kes Communications
1148 South Citrus Avenue
Los Angeles, California 90019

Re: Letter of Intent for lease of property for FM Radio Station

Dear Karen Slade:

In the event the Federal Communications Commission should grant to you and/or your assignees a construction permit for an FM Radio Station at -


Kaloko Ridge, Island of Hawaii
Lat: 19-43-16 Long: 155-55-26
Ground Elevation: 5060 feet -

Then the undersigned agrees to enter into negotiation with you for a lease, subject to the terms and conditions in Motorola's underlying lease, equipment meeting site and engineering standards, frequency compatibility, non-interference and mutually agreed upon terms and conditions for site rental, which will encompass ingress and egress to the subject property on a 24 hour basis.

The terms of the lease have been left open since we realize that it may be a number of years before you obtain FCC authorization to construct the station.

By issuance of this letter, the undersigned intends to give the Federal Communications Commission reasonable assurance of the availability of the subject property for the purpose of filing an application for an FM Radio Station license.

Yours Truly,
Motorola Communication International, Inc.


Conrad Loui
Project Manager, Network Services

CL:rf

CERTIFICATE OF SERVICE

I, Mark Van Bergh, an attorney in the law firm of Wavsdorf &